No. 15505

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

vs.

FRANK L. SMITH, APPELLEE

Brief for Appellee

On Appeal from the United States District Court for the District of Oregon

MAGUIRE, SHIELDS, MORRISON & BAILEY
WALTER J. COSGRAVE,
H. KENT HOLMAN
Attorneys for Appellee.

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STATEMENT OF THE CASE

This action was brought by the United States to recover meat subsidy payments made to appellee during the months of June, July and August, 1945. The subsidy payments made were subject to recapture should it be determined later that appellee had violated any regulation of the Office of Price Administration or the War Food Administration during the monthly reporting period covered by the claims.

Appellee, a meat slaughterer doing business in Portland, Oregon, received subsidies to alleviate the

price squeeze upon slaughterers caused by uncontrolled live cattle prices and controlled prices on meat.

These subsidies were paid under the following statutory and regulatory authority: Section 2(e) of the Emergency Price Control Act of 1942, 56 Stat. 24, 50 U.S.C. App. (1946 Ed.) 902, authorized the Federal Loan Administrator to pay subsidies in such amounts and upon such terms and conditions as the Administrator, with the approval of the President, should determine to be necessary to obtain the required production of commodities previously determined by the President to be strategic or critical. Section 2(e) of the Act above further provided that the subsidies should be paid by corporations created and organized pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, 48 Stat. 1108, as amended, 15 U.S.C. 606 (b)(3). Meat was defined by the President as a "strategic or critical material;" this had the effect of empowering the Federal Loan Administrator under Section 2(e), with the approval of the President, to make a determination of the need for subsidy payments to producers of meat. Under the Stabilization Act of 1942, 56 Stat. 756, as amended, 50 U.S.C. App. (1946 Ed.) 961, et seq., as supplemented by Executive Order 9250 (7 F.R. 7871), the Director of Economic Stabilization was given overriding policy authority over all price and stabilization agencies. In carrying

out this authority, the Director on May 7, 1943, ordered the Federal Loan Administrator to initiate the Livestock Slaughter Subsidy Program. On the same day, the Federal Loan Administrator (who was also Secretary of Commerce), directed the President of the Defense Supplies Corporation, a corporation created pursuant to Section 5(d) of the Reconstruction Finance Corporation Act, to pay subsidies to livestock slaughterers, packers, and wholesalers. This directive was implemented by the issuance of Defense Supplies Corporation Regulation No. 3, which became effective June 7, 1943 (8 F.R. 10826), and which was reissued as Revised Regulation No. 3 effective January 19, 1945 (10 F.R. 4241). By Joint Resolution of June 30, 1945 (59 Stat. 310), Congress dissolved Defense Supplies Corporation and transferred its subsidy administration functions to Reconstruction Finance Corporation.

The subsidy payments in question were made to appellee after appellee had certified that his claims were accurate and that he had not wilfully violated any regulation of the Office of Price Administration or War Food Administration during the monthly reporting period covered by the claims. It was necessary for appellee to make such a certification because compliance with the regulations of the Office of Price Administration and the War Food Administration was a condition precedent to payment of subsidies. Defense Supplies Corporation

was authorized to pay, upon preliminary approval, duly certified subsidy claims.[1] The applicable regulations required the RFC to withhold or invalidate subsidies upon certification by the Office of Price Administration that it had been determined, in a court of first instance or by a hearing commissioner, that the slaughterer had violate a price regulation.[2] D.S.C. Regulation No. 3, effective January 19, 1945, Section 7003.10(a) (10 F.R. 4243), as amended by Amendment 3, effective May 5, 1945, 10 F.R. 8073 and 11153; Office of Economic Stabilization Directive 41, Section 7(b)(2) (10 F.R. 4494).

In 1946, a hearing commissioner determined that appellee had violated the provisions of Control Order No. 1 of the Office of Price Administration by slaughtering cattle and calves in excess of his quotas for June, July and August, 1945. The Office of Price Administration certified this fact to RFC, and RFC, pursuant to Section 7(b)(2) of Directive 41 of the Office of Economic Stabilization, invalidated subsidy payments made to appellee for the months of June, July and August, 1945, in the amount of $37,839.67 (R. 8).[3] The Government re-

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1. D.S.C. Regulation No. 3, effective June 7, 1943, Section 5(d) (8 F.R. 10827); Revised Regulation No. 3, effective January 19, 1945, Section 7003.9(c) (10 F.R. 4243).

2. The Office of Price Administration's functions concerning the payment of subsidies were transferred to the Office of Temporary Controls upon the termination of OPA, and, upon termination of OTC, were given to Reconstruction Finance Corporation. Executive Order 9841, dated April 23, 1947 (12 F.R. 2645).

3. References to the Transcript of Record printed on the appeal will be designated "R.——".

duced this claim $9,528.58 by applying appellee's subsidy claim due for June, 1946, leaving a balance, which the Government now claims is due and owing, of $29,244.74 (R. 8).

This brings the case up to more recent events, when on December 15, 1950, appellee filed a telegraphic protest with the RFC against the invalidation of his subsidy claims (first item of Plaintiff's Exhibit 2). The Government filed the present complaint on February 2, 1956, to reclaim the invalidated subsidy payments (R. 3-8). Attached to the complaint as Exhibit A was a copy of a letter from the RFC's files dated June 25, 1951 (R. 7-8), denying appellee's telegraphic protest of December 15, 1950. At the trial, appellant was unable to prove that the RFC had ever mailed the letter dated June 25, 1951, or any letter denying appellee's protest. Further, appellee denied ever receiving a letter from the RFC denying his protest (R. 29-30, 34).

On the basis of this record the court granted appellee's motion for a directed verdict (R. 41-42).

Appellant moved for a directed verdict (R. 32) and, after this motion was denied and appellee's motion for directed verdict was granted, appellant moved for an order setting aside the verdict and for judgment N.O.V., which was denied (R. 34-35). On October 1, 1956, appellant filed an alternative motion for new trial, and on October 19, 1956, the appellant filed a Supplemental Memorandum of Points

and Authorities in which it was suggested that the court enter judgment for the appellant but grant a stay to permit appellee to appeal to the Emergency Court of Appeals. In an order entered November 5, 1956, the court denied appellant's latter two motions (R. 18). Appellant filed notice of appeal on January 2, 1957 (R. 18-19).

STATUTES INVOLVED

The applicable statutes are set forth in pertinent part in the Appendix, infra, pp. 15-17.

SUMMARY OF ARGUMENT

During the course of the proceedings here involved, the appellant made various motions as follows: Motion for directed verdict (R. 32); motion for an order setting aside the verdict and for judgment N.O.V. (R. 34-35); motion for new trial, made October 1, 1956; and motion for judgment in favor of the United States with a stay of execution thereof so as to enable appellee to appeal to the Emergency Court of Appeals, made October 19, 1956. The court properly denied all these motions and just as properly granted appellee's motion for a directed verdict (R. 41-42).

Appellant was unable to prove that the RFC had ever mailed a letter denying appellee's telegraphic protest of December 15, 1950. Appellee denied ever having received a letter from the RFC denying his protest. With the record in such a state, the court

could not render a judgment in favor of appellant enforcing the collection of a debt. The appellant had no cause of action because there had never been a denial by the RFC of appellee's protest. One of the grounds argued for a directed verdict in favor of appellee was that appellant had no cause of action (R. 35). The directed verdict for appellee was properly granted on this ground.

ARGUMENT

The District Court Could Not Enter Judgment for the Government and Stay Execution Pending a Final Determination in the Emergency Court of Appeals, But Had to Direct a Verdict in Favor of Appellee and Enter Judgment Thereon.

A. *The Reconstruction Finance Corporation Has Never Denied Appellee's Protest.*

Section 203(a) of the Emergency Price Control Act of 1942 (56 Stat. 31) (58 Stat. 638) (50 U.S.C. App. 923) is as follows:

> "At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in

support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the Transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

Pursuant to Section 203(a) of the Act above, appellee filed a telegraphic protest on December 15, 1950, with the Administrator of the RFC, protesting the order of the RFC invalidating subsidy payments for the months of June, July and August, 1945, and June, 1946. Section 203(a) of the Act above requires the RFC to act upon appellee's protest within thirty (30) days. There is no showing that the RFC has ever acted on appellee's protest of December 15, 1950, and there is no showing that the RFC has ever mailed a letter denying appellee's protest or that appellee has ever received a letter from the RFC deny-

ing his protest. In such a case there has not been a denial of appellee's protest as required by Sec. 203(a) of the Act above.

The case of *Amodio v. Reconstruction Finance Corporation,* 191 F. (2d) 862 (Em. Ct. App.), was concerned with whether Amodio had appealed to the Emergency Court of Appeals within the thirty (30) day period allowed by Section 204(a) of the Emergency Price Control Act of 1942, (50 U.S.C. App. 924) infra, pp. 10-11. According to Section 204(a) of the Act, an appeal to the Emergency Court of Appeals must be filed within thirty (30) days after the denial of a protest by the RFC. To determine whether Amodio had appealed within the time allowed, it was necessary to determine when the RFC had made an effective denial of Amodio's protest.

The following is a portion quoted from page 864 of the opinion:

> "A question remains as to when the act of denial of the protest by the respondent actually took place. If the agency had made and entered on its records a formal order of denial, as was the practice of the Price Administrator, the date of denial would undoubtedly be the date on which such order was entered. But here the respondent merely wrote a letter to the complainant's counsel which, it stated, 'should be considered a formal and final denial of your protest.' We do not think that a mere letter can be said to constitute final and definitive action on the

part of the writer until it is committed to the mails. Until then it is wholly subject to modification or recall at the writer's will.

Accordingly where, as here, the respondent follows the informal procedure of denying the complainant's protest by a letter addressed to his counsel, the date which the letter bears is not necessarily the date of denial. For the date of a letter is customarily the date of writing. While it is usually the date of mailing also it frequently appears that a letter is not actually mailed until a later date. And if a letter denying a protest was not in fact mailed until a later date than the one it bears we are satisfied that the date of actual mailing must be regarded as the date of the denial of the protest."

The holding of the court in the Amodio case, as the writer interprets it, is that there has not been final action on a protest until the RFC mails a letter of denial. In effect there is no denial of a protest until a letter of denial is deposited in the mails.

In our case, where there is no proof of mailing or receipt, there never has been an effective denial by the RFC of appellee's protest.

B. *Appellee Has No Right to Appeal to the Emergency Court of Appeals.*

The pertinent part of Section 204(a) of the Emergency Price Control Act of 1942, (50 U.S.C. App. 924(a)), is as follows:

> "Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c) of this section, specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part * * *."

It is apparent from reading the above quoted part of Section 204(a) of the Act that there must be a denial by the RFC of a protest before an appeal may be taken to the Emergency Court of Appeals. In this case there has been no denial by the RFC, therefore appellee has no right to appeal to the Emergency Court of Appeals.

C. *The District Court Could Not Enter Judgment for the Government and Stay Execution Pending a Final Determination in the Emergency Court of Appeals.*

The appellant, to support the affirmative of the above statement, cites two cases: *Silver Pine Oil Company v. Reconstruction Corporation,* 205 F. 2d 835 (Em. Ct. App.), and *Reconstruction Finance Corporation v. Service Pipe Line Co.,* 198 F. 2d 775 (C. A. 10). These cases are readily distinguishable from the case before this court. The pertinent facts are identical in the two cases above cited so the following statement will be phrased in the singular but shall be applicable to both cases. A letter order was

mailed by the RFC demanding a refund of subsidies paid. The letter order was admittedly received and was not protested. Subsequently the RFC brought suit in District Court to recapture subsidies paid, and the District Court entered judgment for the RFC with leave to the defendant to file suit in the Emergency Court of Appeals. The defendant filed suit in the Emergency Court of Appeals, but the case was dismissed for lack of jurisdiction with the advice given that the defendant should file a protest with the RFC, and upon denial by the RFC, refile in the Emergency Court of Appeals. The defendant proceeded to file a protest with the RFC, the RFC denied the protest, and the defendant refiled in the Emergency Court of Appeals, which then took jurisdiction of the case. This is rather involved procedure, but it is quite clear that the two cases cited by appellant are not authority for appellant's position that the District Court should have rendered judgment in favor of the Government in this case with leave to appellee to file in the Emergency Court of Appeals. In the Silver Pine Oil case, supra, and in the Service Pipe Line case, supra, it was proper for the District Court to enter judgment in favor of the RFC as the actions were based on orders of the RFC which had never been protested. There was nothing more for the administrative agency to do, therefore the court could enter judgments based on the final RFC orders.

In our case, appellee has protested to the RFC and there never has been any administrative action on the protest as required by Section 203(a) of the Act. Judgment could not be rendered in favor of the Government with leave given to appellee to file suit in the Emergency Court of Appeals because appellee has filed a protest with the RFC and the RFC has not disposed of the protest.

D. *The District Court Properly Directed a Verdict for Appellee and Entered Judgment Thereon.*

With the record in the state in which it is, the District Court was obliged to direct a verdict in favor of appellee and to enter judgment thereon. The appellant was unable to prove that the RFC had ever mailed a letter to the appellee, denying appellee's protest of December 15, 1950. Appellee denied ever having rceived a letter from the RFC denying appellee's protest. This left the protest still before the RFC, and left the appellant without a cause of action. The claim of the RFC was simply not enforcible in the District Court, and therefore the directed verdict in favor of appellee and judgment thereon was proper.

CONCLUSION

This case, for all the wealth of authorities, statutes, regulations, orders, directives, etc., thrown at the court by the Government, is a very simple case.

Under the facts shown by the record the RFC has never effectively disposed of appellee's protest. It is still before the RFC. In such a case the Government does not have a cause of action to enforce collection of a debt in the District Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

MAGUIRE, SHIELDS, MORRISON & BAILEY,

WALTER J. COSGRAVE,

H. KENT HOLMAN,

Attorneys for Appellee.

APPENDIX

Section 2 (50 U.S.C. App. 902):

"* * * *

(e) Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: PROVIDED, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by cor-

porations created or organized pursuant to such section 5d; * * * "

Section 203(a) of the Emergency Price Control Act of 1942, (56 Stat. 31) (58 Stat. 638) (50 U.S.C. App. 923) is as follows:

"At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the Transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and

of any economic data and other facts of which the Administrator has taken official notice."

Section 204(a) of the Emergency Price Control Act of 1942, (50 U.S.C. App. 924(a)), is as follows:

"Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c) of this section, specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * * "